United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 75-812

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-812

HOTAFT MANAGEMENT CORPORATION,

Plaintiff-Appellant,

against

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and NEW YORK TELEPHONE COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE, NEW YORK TELEPHONE COMPANY

GEORGE E. ASHLEY
Attorney for Defendant-Appellee
New York Telephone Company
1095 Avenue of the Americas
New York, New York 10036
212 395-0059

WALTER C. REID
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Preliminary Statement

This is an appeal from an order of the District Court (Carter, J.) (a) denying the motion of plaintiff-appellant, Hotaft Management Corporation (hereinafter sometimes called the "plaintiff") for a preliminary injunction and (b) dismissing the complaint.

Plaintiff is the new and most recent owner of the Hotel Taft, one of New York City's larger hotels (55).* Defend-

* Numbers in parentheses refer to pages in the Appendix unless otherwise indicated.

ant-appellee, New York Telephone Company (the "Company" or "defendant") is a New York corporation which furnishes telephone service and facilities in the City and State of New York.

Statement of the Case

When plaintiff took over ownership of the hotel in September, 1974, the Company requested credit information from the plaintiff, including details of plaintiffs prior hotel experience, if any (24). When this information was not forthcoming, plaintiff contacted one Robert Lee (who is alleged to be the president and sole share owner of plaintiff), and requested a $56,000.00 advance deposit which, based upon prior service to the hotel, the Company estimated to be the equivalent of two months charges (24).

At the time this demand was made the prior management of the Hotel Taft owed the Company over $18,000.00 for telephone service and usage (24). Mr. Lee protested the demand, asserting that plaintiff had no financial relationship to the prior owner. However, at Mr. Lee's request a compromise was worked out where the plaintiff agreed to deposit $30,000.00 in three monthly installments on the specific understanding that plaintiff would pay its bill within five days of receipt (24). This understanding was confirmed by a writing which provided that if the advance deposit or bill payments were not made on the agreed dates, plaintiff's outgoing service would be interrupted and its incoming service terminated five days thereafter (33).

At the time plaintiff commenced this action, it had made an advance deposit of only $20,000.00 (25). On October 11, 1974, the *New York Times* published an article in its Real Estate Section which revealed that Mr. Lee was a lawyer with no previous experience in the hotel industry and that he had acquired the hotel from a company con-

trolled by one Gilbert Fedebush, who had himself been involved in two prior hotel failures; the Hotel Taft was running a deficit of $80,000.00 a month and that its occupancy rate had dropped below 50% during the previous summer. Mr Lee was reported as having commented that he felt himself "lucky" that the occupancy rate had risen to 54%, although he noted that "the break-even point" was between 56% and 58% occupancy (25-26).

During the same period, the Company was advised that Mr. Fedebush, the prior owner, was negotiating for the purchase of the Carriage House Hotel in Miami, Florida; the telephone company in Miami was considering the desirability of a deposit, and Mr. Fedebush had represented that he was the owner of the Hotel Taft in New York City (26).

As of this time, the Company had also been unable to locate any record of plaintiff's alleged incorporation on file with the New York State-Division of Corporations (25).

Upon receipt of the foregoing information, Mr. Lee was again contacted by the Company and requested to pay the full deposit, based on two months estimated telephone charges. Mr. Lee demanded a meeting with the Public Service Commission which was held on November 7, 1974 before Charles Kraft, Associate Telephone Engineer of the New York State Public Service Commission (39). The Commission agreed with the Company that under the circumstances, the full deposit of $56,000.00 was appropriate. In its letter to Mr. Lee dated November 27, 1974, the Commission explained:

> "The telephone company's tariff, as well as the Public Service Law, allows the company to request a deposit equal to two months average billing period. Since Hotaft is a new corporation and there is no previous credit history, a deposit of $56,000.00 corresponding to the most recent two months average billing is considered appropriate." (42)

Mr. Lee then demanded a formal hearing before the Commission. After consideration, his request was denied and the decision of Mr. Kraft affirmed (57).

On February 7, 1975, the Company wrote a letter to the plaintiff advising it that "in accordance with the recent PSC determination" telephone service on Hotel Taft telephones would be interrupted unless, on Friday, February 14, 1975, an additional deposit of $26,000.00 was paid (43). This amount, as it turned out, was actually $36,000.00, since the February 7th letter had been written in the mistaken belief that plaintiff had already complied with his original agreement to make an advance deposit (28).

The Action Below

A motion for a preliminary injunction was heard on February 21, 1975. A temporary restraining order was entered and plaintiff was directed to post $20,000.00 in cash with the District Court, which was done (57).

The complaint filed below, which is rather broadly drawn, contains five separate claims, each called a "cause of action". The first claim is for injunctive relief and damages for breach of contract against the defendant New York Telephone Company; the second claim requests injunctive relief against the defendant A T & T as the parent company of the defendant New York Telephone Company; the third claim is apparently based on the Commerce Clause and the Communications Act of 1934 and is for monetary damages, including treble damages under the anti-trust laws; the fourth claim alleges discrimination under various unspecified acts of Congress and seeks substantial monetary damages; the fifth claim alleges deprivation of plaintiff's property without due process of law.

The District Court's determination

The District Court denied plaintiff's motion for a preliminary injunction and dismissed the complaint, ruling that in addition to the fact that no federal question had properly been raised, plaintiff's claim was, in any event, clearly barred under 28 U.S.C. § 1342, since an appropriate remedy appeared to exist in the state courts.

The Background of the Deposit Tariff

The provisions apparently challenged by the plaintiff which are part of Section 1 of Public Service Commission Tariff No. 800, permit the Telephone Company to require a deposit equivalent to two months' estimated service from any subscriber who has not established his financial responsibility to the satisfaction of the Telephone Company. The tariff requires the Telephone Company to pay 8% interest and allows it to return a deposit for business service within four years if the account has not been delinquent.

The tariff itself reads in relevant part as follows:

> "H. Payments and Termination of Service.
>
> 1. Advance Payments and Deposits
>
> * * *
>
> Any applicant or subscriber, whose financial responsibility is not established to the satisfaction of the Telephone Company, may also be required to deposit a sum up to an amount equal to the total of the estimated charges for two months for the facilities and service.
>
> * * *
>
> Simple interest at the rate of 8% per annum is credited or paid to the subscriber annually during the continuance of the deposit. Deposits held in connection with . . . business service shall be returned to the subscriber after a period not to exceed four years provided that the subscriber's account is not classified as 'delinquent'."

An express statutory provision with respect to public utility deposits was enacted in 1970, in Section 120 of the Public Service Law. Section 120 permits deposits of two months' charges and provides for the payment of interest on deposits, the return of deposits, and the issuance of regulations by the Commission. Section 120 reads in part as follows:

> "§ 120. Consumer deposits
>
> A . . . telephone corporation . . . may require any person to whom such corporation . . . shall supply . . . telephone services to deposit a reasonable sum of money according to the estimated quantity of such services necessary to supply the same for two calendar months, to secure payment for such services actually rendered . . . but every such corporation . . . shall allow to every such depositor interest at a rate per annum to be prescribed from time to time, at least annually, by the [Public Service] Commission in the light of current economic conditions and current charges paid for other monies borrowed by such corporation . . . on the sum or sums so deposited . . . If the depositor was not delinquent in the payment of any bill in such two year period, the deposit shall be refunded promptly at the end thereof, but without prejudice to the right to require a deposit thereafter in the event of a delinquency, and to retain such deposit for a prudent period; except that subject to such regulations as the commission may establish, if the deposit is for utility service rendered to a business, the deposit may be retained for a prudent period beyond such a two year period."

After Section 120 was enacted, the Commission adopted a resolution, Case No. 25695 (1970), requiring deposit tariffs to comply with a full set of regulations which were issued by the Commission at that time and which imple-

ment the requirements of Section 120 of the Public Service Law. 16 NYCRR 600 *et seq.* The tariff provisions challenged by plaintiff here are in full conformity with Section 120 and with the Commission's regulations.

The Operation of the Deposit Tariff

The Telephone Company is required to furnish service to all who seek it, and must of necessity offer virtually unlimited credit to its subscribers once their telephones are installed (29). In order to limit its uncollectible debt, which would otherwise be reflected in higher rates to the vast majority of subscribers who pay their telephone bills promptly, the Telephone Company asks for a deposit where a subscriber is unable otherwise to establish financial responsibility (29).

When the Telephone Company receives a request for business telephone service, it attempts to obtain certain information from the applicant in order to determine if a deposit should be required (31-32). The applicant is asked uniform questions which are intended solely to evaluate financial responsibility. An important factor is whether an individual has had previous telephone service at any other location, and if so, whether he has paid his telephone bills promptly. Other factors include general credit information, whether the applicant owns or leases his premises, and the existence of bank accounts. The service representative then evaluates all of these factors and only in those cases in which a deposit is the sole means for a subscriber to establish credit will a deposit be requested (30).

The uncollectible debt suffered by the Telephone Company has grown to $21,273,963 in 1974, and the Telephone Company expects that the final total will exceed this sum in 1975 (30). During this time, the Telephone Company has asked fewer and fewer subscribers to post deposits (30).

The collection and administration of deposits is a costly and time consuming operation for the Telephone Company. The Telephone Company's desire to limit deposits results also in the fact that, although the tariff and Section 120 of the Public Service Law allow the Telephone Company to retain deposits for up to four years even if the business subscriber's bills are paid promptly, the Telephone Company refunds all deposits within a shorter period if the subscriber's account has not been delinquent (30).

ARGUMENT

POINT I

Plaintiff's motion was properly denied because plaintiff failed to establish any right to a preliminary injunction.

An injunction granted prior to trial is an extraordinary remedy which should not be granted unless the moving party can meet the heavy burden of establishing: (1) that there is an immediate threat of irreparable injury; (2) that it lacks an adequate remedy at law; (3) that the injunction sought will not unduly injure defendant or the general public; and (4) that plaintiff has a clear right to the ultimate relief requested. *See, generally,* 7A Weinstein, Korn & Miller, *New York Civ. Prac.* ¶ 6301.09 *et seq.* (1972). Plaintiff failed in the Court below to make a showing of any of these requirements for a preliminary injunction. It is significant that plaintiff sought an order enjoining the Telephone Company from enforcing tariff provisions which require a deposit equivalent to two months' estimated service from any subscriber who has not established his financial responsibility to the satisfaction of the Telephone Company. Thus, plaintiff demanded, without trial, the ultimate relief sought in the complaint. In such a situation, the burden upon the plaintiff was especially

heavy and preliminary injunction could not have been granted unless plaintiff had shown both a clear right to the ultimate relief sought and an immediate threat of irreparable injury. *E.g., Barracini, Inc.* v. *Barracini Shoes, Inc.*, 1 App. Div. 2d 905, 149 N.Y.S. 2d 739 (2d Dep't 1956); *Elk St. Market Corp.* v. *Rothenberg*, 233 App. Div. 243, 251 N.Y.S. 259 (4th Dep't 1931); *Maloney* v. *Katzenstein*, 135 App. Div. 224, 120 N.Y.S. 418 (1st Dep't 1909); *McKesson & Robbins, Inc.* v. *New York State Bd. of Pharmacy* (not officially reported), 226 N.Y.S. 2d 271 (Sup. Ct. Westchester Co. 1962).

A. Plaintiff failed to show a clear right to the ultimate relief sought.

A preliminary injunction was properly denied because plaintiff did not demonstrate any clear legal right to the ultimate relief sought. *See, e.g., Park Terrace Caterers, Inc.* v. *McDonough*, 9 App. Div. 2d 113, 191 N.Y.S. 2d 1001 (1st Dep't 1959); *Weisner* v. *791 Park Ave. Corp.*, 6 N.Y 2d 426, 160 N.E. 2d 720, 190 N.Y.S. 2d 70 (1959); *Rabenold* v. *Associated Gas & Elec. Co.*, 148 Misc. 507, 266 N.Y.S. 520 (Sup. Ct. N.Y. Co. 1933); *Mizrahi* v. *Cohen*, 1 Misc. 2d 174, 146 N.Y.S. 2d 605 (Sup. Ct. N.Y Co. 1955); *Columbia Gas* v. *New York State Elec. & Gas Corp.*, 56 Misc. 2d 367, 289 N.Y.S. 2d 339 (Sup. Ct. Broome Co. 1968). *See also, Platt* v. *New York Tel. Co.* (Sup. Ct. N.Y. Co.), N.Y.L.J., Aug. 18, 1970, at 2, col. 2; *Options on Shares, Inc.* v. *New York Tel. Co.* (Sup. Ct. N.Y. Co.), N.Y.L.J., Aug. 4, 1970, at 2, col. 2; *id.* (Sup. Ct. N.Y. Co.), N.Y.L.J., July 6, 1970, at 2, col. 7.

Indeed, it is clear as a matter of law that plaintiff had no right to the ultimate relief sought, for the reason that it would be contrary to the applicable tariff provisions. Telephone service is provided by the Telephone Company pursuant to the rates, rules and regulations provided in tariffs filed with the Public Service Commission pursuant to § 92 of the Public Service Law, which are binding upon

the Telephone Company and its subscribers. Sanction of plaintiff's refusal to adhere to the tariffs would have placed the Telephone Company in violation of the New York Public Service Law, which provides that the Telephone Company shall not grant any person any preference not accorded other subscribers. N.Y. Pub. Serv. L. §§ 91 (2) (3), 92(2) (3). *See, Public Serv. Comm'n* v. *Pavilion Natural Gas Co.,* 232 N.Y. 146, 133 N.E. 427 (1921); *Town of North Hempstead* v. *Public Serv. Corp.,* 231 N.Y. 447, 132 N.E. 144 (1921); *Stern Bros., Inc.* v. *New York Edison Co.,* 251 App. Div. 379, 296 N.Y.S 857 (1st Dep't 1937).

Plaintiff was not entitled to the ultimate relief sought for the additional reason that the subject matter of its complaint was clearly subject to the primary or exclusive jurisdiction of the Public Service Commission. Moreover, because the Commission had already entered an order approving the tariff governing the use of advance deposits, plaintiff's action was an improper collateral attack upon a previous Commission order (see Point IV).

The absence of any clear showing of likelihood of ultimate relief precluded the issuance of a preliminary injunction.

B. Plaintiff did not show an immediate threat of irreparable injury.

In the absence of a showing of immediate threat of irreparable injury, a preliminary injunction cannot be granted. *E.g., Kane* v. *Walsh,* 295 N.Y. 198, 66 N.E. 2d 53 (1956); *Eldre Components, Inc.* v. *Kliman,* 47 Misc. 2d 463, 262 N.Y.S. 2d 732 (Sup. Ct. Monroe Co. 1965).

Denial of plaintiff's motion did not result in irreparable injury, nor indeed in any injury, since plaintiff had it within its own power to avoid discontinuance to telephone service by simply supplying the requested deposit, which it has done. The need to pay money has never qualified as irreparable injury so as to justify injunctive relief. *Kane*

v. *Walsh, supra.** Plaintiff faced discontinuance of telephone service only if it continued to refuse to permit compliance with tariff regulations.

C. Plaintiff had an adequate remedy at law.

Plaintiff had an adequate legal remedy by a complaint to the Public Service Commission, and judicial review under CPLR Article 78 from any adverse Commission decision. The presence of such a remedy also required denial of the motion for a preliminary injunction. *Knower* v. *Atkins*, 273 App. Div. 356, 77 N.Y.S. 2d 559 (1st Dep't 1948), *aff'd without opinion*, 298 N.Y. 750, 83 N.E. 2d 150 (1948); *Mullooly* v. *Union Free School Dist. No. 8*, 20 Misc. 2d 795, 190 N.Y.S. 2d 809 (Sup. Ct. Nassau Co. 1959).

POINT II

The Telephone Company's deposit tariff is both reasonable and valid.

In the area of public utility regulation, it has uniformly been held that telephone companies may adopt reasonable regulations relating to all aspects of their service; so long as those regulations are not unreasonable, their validity has been upheld. *See, e.g., Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945); *Southwestern Tel. & Tel. Co.* v.

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* *See, e.g., Red Rope Indus., Inc.* v. *American Tel. & Tel. Co.* (Sup. Ct. N.Y. Co.), N.Y.L.J., Jan. 5, 1971, at 2, col. 2, where the court denied a motion for a preliminary injunction restraining suspension of telephone service, stating: "It does not appear that plaintiff, if it paid the charges under protest, will be damaged in any irreparable fashion for which it cannot be fully compensated monetarily, if ultimately successful." *See also, e.g., Advanced Computer Techniques Corp.* v. *New York Tel. Co.*, Civil No. 70-4210 (S.D.N.Y. Mar. 16, 1971); *Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.*, 234 F. Supp. 4 (N.D.N.Y. 1964); *Goldenthal* v. *New York Tel. Co.*, 68 Misc. 2d 749, 327 N.Y.S. 2d 732 (Sup. Ct. Kings Co. 1972), *aff'd* (not officially reported), 337 N.Y.S. 2d 495 (2d Dep't 1972).

Danaher, 238 U.S. 482 (1915); *Palma* v. *Powers,* 295 F. Supp. 924 (N.D. Ill. 1969); *Katz* v. *American Tel. & Tel. Co.,* 92 P.U.R. (n.s.) 1 (F.C.C. 1951).

The reasonableness of deposit tariffs has been upheld by the Supreme Court of the United States and other courts, both federal and state. *E.g., Southwestern Tel. & Tel. Co.* v. *Danaher, supra; Riegel* v. *Public Util. Comm'n,* 48 F. 2d 1023 (D.C. Cir.), *cert. denied,* 284 U.S. 644 (1931); *Wood* v. *Public Util. Comm'n,* 4 Cal. 3d 288, 481 P. 2d 823, *appeal dismissed,* 404 U.S. 931 (1971); *David* v. *N.Y. Tel. Co.,* 341 Fed. Supp. 945 (S.D.N.Y. 1972), aff'd 470 Fed. 2d 192 (2d Cir. 1973). *Cf., Margolis* v. *New York Tel. Co.,* 27 App. Div. 2d 595, 275 N.Y.S. 2d 678 (3d Dep't 1966).

In *Southwestern Tel. & Tel. Co.* v. *Danaher, supra,* the plaintiff alleged that the telephone company had improperly terminated her service, and she sought to recover a statutory penalty. In holding that the telephone company was entitled to enforce its regulation allowing it to terminate service for nonpayment, the United States Supreme Court reversed an award of statutory penalties by the state court. The Court held that the telephone company's regulation was reasonable, and stated:

> "[T]he telephone company was entitled to adopt reasonable regulations respecting the conduct of its business and the terms upon which it would serve its patrons, and could enforce such regulations against any patron refusing or failing to comply therewith by suspending or discontinuing the service to him during the continuance of his refusal or failure without being chargeable with discrimination . . ." *Id.* at 488.

The Court added that it,

> "uniformly is held that a regulation requiring payment in advance or a fair deposit to secure payment is reasonable . . ." *Id.* at 490.

In *Riegel* v. *Public Util. Comm'n, supra,* plaintiff alleged that an order of the Public Utilities Commission of the District of Columbia which allowed utilities to require a deposit equal to "anticipated cost for one or two months" from a subscriber who failed to meet conditions for credit established by the utility was unlawful. 48 F.2d at 1024. Plaintiff's challenge, based on his contention that the order was "discriminatory," was rejected as "wholly without merit." *Id.* In dismissing the complaint, the District of Columbia Circuit, citing *Danaher,* offered the following reason for upholding the deposit requirement:

> "The only purpose of the rule is to assure payment by the customer or subscriber for the service which he gets. This the utility, like any other business organization, has a right to demand in advance if it wishes . . . or, if it should not, to impose reasonable conditions as a basis of credit." *Id.* at 1024.

In a recent challenge to deposit tariffs, the California Supreme Court held that they were reasonable and did not violate the Equal Protection Clause. *Wood* v. *Public Util. Comm'n, supra,* 481 P. 2d at 828. In that case, the petitioners argued that the deposit tariffs violated the Equal Protection Clause by permitting certain subscribers of telephone and gas companies to establish credit without posting a deposit.* Holding that the deposit was part of the utilities' "rate structures", *id.* at 827, the California Supreme Court found that the deposit tariff satisfied the standard of reasonableness under the Equal Protection Clause for the following reasons:

> "Examining the credit rules in their entirety, we are convinced that the commission could reasonably con-

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* In *Wood* v. *Public Util. Comm'n, supra,* a subscriber could establish credit without posting a deposit in essentially the same manner that a subscriber can establish credit with the Telephone Company without deposit, *e.g.,* prior utility service, satisfactory employment, ownership or real property, etc. 481 P. 2d at 826.

clude that persons who could satisfy none of the alternate methods of establishing credit other than by making a deposit presented greater risks of bad debt losses than those who could satisfy one or more of those alternatives. Past payment of bills, ownership of real property, job stability, steady income, professional standing and ability to provide a guarantor all have some relationship to creditworthiness. Moreover, recognition of these categories together with the flexible category of establishment of credit to the utility's satisfaction necessarily serves to eliminate hardship that would in many cases otherwise be imposed upon the poor. Persons falling into these categories are not necessarily wealthy, and to invalidate those categories might as likely lead to no exceptions to the deposit requirements as to a successful quest for preferable exceptions." *Id.* at 828.

In *Manhattan Reporting Bureau, Inc.* v. *New York Tel. Co.*, 1926B P.U.R. 1 (N.Y. Pub. Serv. Comm'n 1925), the New York State Public Service Commission upheld a challenge to the deposit tariff and stated:

> "It must be held to be reasonable for the Company to demand a deposit from subscribers whose credit is bad or who have no credit or standing because from its nature telephone service is rendered in advance of payment to regular subscribers and the determination of when this advance payment should be demanded must be left to the Company itself as the Commission cannot intervene to that extent with the details of the Company's business." *Id.* at 3.

And in *Bennett* v. *Eastchester Gas Light Co.*, 40 App. Div. 169, 57 N.Y.S. 847 (2d Dep't 1899), the Appellate Division held that the amount of the deposit requested by a utility is presumed to be reasonable. *Id.*, 57 N.Y.S. at 848.

The New York courts have rejected a constitutional challenge to a similar telephone tariff which permits the Telephone Company to require advance payment for monthly service charges. *Margolis* v. *New York Tel. Co., supra.* See, also, *Hare* v. *New York Tel. Co.,* 101 Misc. 490, 164 N.Y.S. 732 (Rensselaer County Ct.), *aff'd,* 181 App. Div. 907, 167 N.Y.S. 1103 (3d Dep't 1917), holding that "to exact payment in advance is only a reasonable exercise of the power vested within the province of the Company, . . ." *Id.,* 164 N.Y.S. at 734.

Deposits tariffs have uniformly been upheld as reasonable by courts in other jurisdictions. See, *e.g., Wood* v. *Public Util. Comm'n, supra; Southwestern Bell Tel. Co.* v. *Batemen,* 223 Ark. 432, 266 S.W. 2d 289 (1954); *Underwood* v. *Southern Cities Distributing Co.,* 157 So. 160 (La. 1934); *Carpenter* v. *Home Tel. Co.,* 122 Vt. 50, 163 A. 2d 838 (1960). And the regulatory commissions of other states have consistently upheld the reasonableness of deposit tariffs. *See, e.g., Re Guarantee and Deposit Rules and Disconnect Procedure,* 11 P.U.R (n.s.) 439 (Wis. Pub. Serv. Comm'n 1935); *Re Deposits with Power Companies,* 11 P.U.R. (n.s.) 407 (S. Car. R.R. Comm'n 1935); *J. C. Hulings* v. *Crystal Springs Park Water Co.,* 25 P.U.R. (n.s.) 410 (Pa. 1938).

The reasonableness of deposit tariffs which allow the utility to decide which subscribers should be required to post deposits was expressed as follows by the Wisconsin Public Service Commission:

> "We believe that the question of deciding who should or should not furnish deposits or guaranties is primarily one of management and, subject to the rule of reasonable application, should be left to managerial discretion . . . It would appear that the management by the reasonable exercise of judgment, should be better able to pass originally upon the credit rating of its customers than a third party which, except upon

> review of the reasonableness of the management's judgment, has little opportunity to become acquainted directly with the character or financial standing of the customer." *Re Guarantee and Deposit Rules and Disconnect Procedure, supra,* 11 P.U.R. (n.s.) at 443.

The deposit practices of the Telephone Company are reasonable and, the subscriber is given every opportunity to establish credit without posting a deposit (29). Each subscriber is evaluated on the basis of uniform factors relating solely to financial responsibility. If a deposit is required, the amount of the deposit is not based on financial resources, although that would be a rational and constitutionally permissible factor in evaluating financial responsibility. Rather the size of the deposit is based on the subscriber's previous average two months' charges, or—in the case of new subscribers—on average two months' charges of subscribers in the same business office district. The deposit is automatically returned to all subscribers after one year, provided that they have not been delinquent in making payments. The Telephone Company must limit unnecessary bad debt losses which are otherwise eventually reflected in higher telephone rates. The deposit tariff is a reasonable means to accomplish this end.

POINT III

The complaint was properly dismissed because its claims were within the primary or exclusive jurisdiction of the New York Public Service Commission.

The most favorable inference which might have been accorded the plaintiff's claim was that the defendant's tariff was unreasonable or defendant in enforcing its tariff, in plaintiff's instance, had acted in a discriminatory manner. However, in either case, the plaintiff at best raised matters which were within the primary or exclusive juris-

diction of the New York Public Service Commission and not subject to the jurisdiction of the Federal Court.

The New York Public Service Law contains a pervasive system of regulation of telephone rates and practices which manifests the clear intent of the Legislature that the practices followed by the Telephone Company in providing service and collecting revenues are to be subject to unitary, expert regulation by the Public Service Commission. The Commission is empowered to investigate complaints and to require the Telephone Company to take appropriate remedial action. For these purposes, the Public Service Law contains several broad grants of authority to the Commission, such as the following:

> § 94(2) "The commission shall have general supervision of all . . . telephone corporations . . . with respect to their compliance with all provisions of law . . .
>
> § 96(3) "Complaints may be made to the commission by any person or corporation aggrieved . . . [and the Commission may] investigate such charges . . .
>
> * * *
>
> § 97(1) "Whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon a complaint that the rates . . . or that the rules, regulations or practices . . . are unjust, unreasonable or unjustly discriminatory . . ., the commission shall . . . determine the just and reasonable rates . . .
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> * * *
>
> § 97(2) "Whenever the commission shall be of the opinion, after a hearing . . . that the rules, regulations or practices of any . . . telephone corporation are unjust or unreasonable . . ., the commission shall determine the just, reasonable, adequate, efficient and proper regulations [and] practices . . ."

In addition, the Commission is required by statute to commence enforcement proceedings under Section 103 of the Public Service Law whenever it is of the opinion that a telephone company is violating a law or any order of the Commission.

The reasonableness of tariffs or practices followed by a public utility is a well-established aspect of the jurisdiction of the Public Service Commission. *Jacob Goodman & Co.* v. *New York Tel. Co.*, 285 App. Div. 404, 137 N.Y.S. 2d 797 (1st Dep't), *aff'd*, 309 N.Y. 258, 128 N.E. 2d 406 (1955); *Freedom Finance Co.* v. *New York Tel. Co.*, 29 App. Div. 2d 545, 285 N.Y.S. 2d 163 (2d Dep't 1967); *Goldenthal* v. *New York Tel. Co.*, 40 A.D. 2d 825, # 3 Memo (2d Dep't 1972); *Earl Carroll Realty Corp.* v. *New York Edison Co.*, 141 Misc. 266, 252, N.Y.S. 538 (Sup. Ct. N.Y. Co. 1931).

All aspects of the rate-making process are within the primary jurisdiction of the Commission, *Margolis* v. *New York Tel. Co.*, 27 App. Div. 2d 595, 275 N.Y.S. 2d 678 (3d Dep't 1966); *Cardone* v. *Consolidated Edison Co.*, 197 Misc. 188, 94 N.Y.S. 2d 94 (App. T. 1949), *aff'd*, 276 App. Div. 1062, 96 N.Y.S. 2d 491 (1st Dep't 1950); *Central Hudson Gas & Elec. Corp.* v. *Napoletano*, 277 App. Div. 441, 101 N.Y.S. 2d 57 (3d Dep't 1950); *Columbia Gas* v. *New York State Elec. & Gas Corp.*, 56 Misc. 2d 367, 289 N.Y.S. 2d 339 (Sup. Ct. Tompkins Co. 1968).

In the *Goodman* case, the plaintiff challenged the propriety of the Telephone Company's billing methods. The Appellate Division of the New York Supreme Court, relying upon the doctrine of primary jurisdiction, dismissed the complaint for failure to state a cause of action. In affirming the "well-reasoned unanimous opinion of the Appellate Division," 309 N.Y. at 267, the New York State Court of Appeals stated that the Public Service Commission,

> ". . . created by law even as are the courts, it is in a much better position, with its superior expert

> engineering staff and other facilities, . . . to make appropriate orders with far greater flexibility than the courts." *Id.* at 266-67.

And in *Cardone, supra,* the court stated:

> "[I]t appears to be well established law that the reasonableness of rates, rules or practices, promulgated by a utility, like defendant, is a question to be determined in the first instance by the Public Service Commission; this is a rule of primary administrative jurisdiction, and in such cases preliminary resort to the Commission is required in the first instance, and not to the courts." 94 N.Y.S. 2d at 97.

The principal of primary jurisdiction applies whenever it is alleged that a public utility is acting in an unreasonable and discriminatory manner or that a tariff provision filed with the Public Service Commission is unreasonable or discriminatory. The New York State courts have recognized the necessity to apply primary jurisdiction where, as here, the gravamen of an action is the reasonableness of rates, acts or practices. *Margolis* v. *New York Tel. Co., supra,* 27 App. Div. 2d 595, 275 N.Y.S. 2d 678 (3d Dep't 1966); *Goldenthal* v. *New York Tel. Co., supra; Childs* v. *Brooklyn Edison Co.,* 105 N.Y.S. 2d 503 (Sup. Ct. Kings Co., 1951); *Ten Ten Lincoln Place, Inc.* v. *Consolidated Edison Co.,* 190 Misc. 174, 73 N.Y.S. 2d 2 (Sup. Ct. Kings Co. 1947), *aff'd,* 273 App. Div. 903, 77 NYS 2d 168 (2d Dep't 1948), *leave to appeal denied,* 298 N.Y. 937, 80 N.E. 2d 547 (1949); *Croydon Syndicate, Inc.* v. *Consolidated Edison Co.,* 72 N.Y.S. 2d 846 (Sup. Ct. N.Y. Co. 1947).

Thus, the New York State courts have applied the principle of primary jurisdiction when it is alleged that tariffs or practices are being *applied* in a discriminatory and unreasonable manner. *Freedom Finance Co.* v. *New York*

Tel. Co., supra, 29 App. Div. 2d 545, 285 N.Y.S. 2d 1963 (2d Dep't 1967); *Goldenthal* v. *New York Tel. Co., supra; M. R. Glass, Inc.* v. *New York Tel. Co.,* 48 Misc. 2d 21, 264 N. Y. S. 2d 160 (Sup. Ct. N.Y. Co. 1965); *Leighton* v. *New York Tel. Co.,* 184 Misc. 827, 55 N.Y.S. 2d 193 (Sup. Ct. N.Y. 1945); *Leighton* v. *New York Tel. Co.,* 84 N.Y.S. 2d 369 (Sup. Ct. N.Y. 1948).*

In the *Freedom Finance* case, *supra,* the court granted the Telephone Company's cross-motion for summary judgment, and stated:

> "Plaintiff's contentions that, as applied to it, defendant's pertinent rules, regulations and threatened action are arbitrary, unreasonable and without authority under the pertinent statutes or regulations on file with the Public Service Commission and rest in whole or in part upon its own valid, self-serving rules and regulations, are to be determined in the first instance by the Public Service Commission." 285 N.Y.S. 2d at 164.

Plaintiff's claims clearly called for the application of primary jurisdiction. The matters raised by the complaint as to telephone revenues and related practices were intended by the New York State Legislature to be left to unitary, expert administrative regulation by the Public Service Commission. The Commission has the background and personnel necessary to consider these issues in light of all relevant circumstances. The appropriate procedure is not to seek federal redress but rather, if desired, to seek State court review pursuant to Article 78 of the Civil Practice Law and Rules.

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* Primary jurisdiction over rates and practices is also recognized under federal regulatory statutes. *E.g., Lichten* v. *Eastern Airlines, Inc.,* 189 F. 2d 939 (2d Cir. 1951).

POINT IV

The relief requested by plaintiff in the District Court was an improper collateral attack upon an order previously entered by the Public Service Commission.

An order or determination of an administrative body is not subject to collateral attack, and the proper method of challenging such order or determination is an Article 78 proceeding. *See, e.g., Matter of Foy* v. *Schechter,* 1 N.Y. 2d 604, 136 N.E. 2d 883, 154 N.Y.S. 2d 927 (1956); *Godfrey* v. *Winona Lake Development Co.,* 194 Misc. 905, 88 N.Y.S. 2d 531 (Sup. Ct. Albany Co. 1946).

In the *Foy* case, plaintiffs brought an action challenging as arbitrary a salary grading resolution made by the Civil Service Commission. The Court of Appeals, in holding that the action was an improper collateral attack upon the Commission's resolution, stated:

> "The determination of the commission is binding unless and until it is annulled in an article 78 proceeding . . . upon the ground that it is arbitrary. *It is well established that determinations which are made within the jurisdiction of the official or body concerned, stand unless they are avoided by a direct attack* . . ." 1 N.Y. 2d at 612, 154 N.Y.S. 2d at 933 (Emphasis added.)

Similarly, orders entered by the Public Service Commission are reviewable only under Article 78. *New York Tel. Co.* v. *Public Serv. Comm'n,* 36 App. Div. 2d 261, 320 N.Y.S. 2d 280 (3d Dep't), *modified,* 29 N.Y. 2d 164, 324 N.Y.S. 2d 53 (1971); *In re Grade Crossing Elimination,* 238 App. Div. 484, 264 N.Y.S. 651 (4th Dep't 1933), *aff'd,* 265 N.Y. 615, 193 N.E. 412 (1934); *City of New York* v. *Public Serv. Comm'n,* 17 App. Div. 2d 581, 237 N.Y.S. 2d 617 (3d Dep't 1963); *Long Island Lighting Co.* v. *Maltbie,* 249 App.

Div. 918, 292 N.Y.S. 807 (3d Dep't 1937); *Town of North Hempstead* v. *Public Serv. Corp.*, 199 App. Div. 189, 191 N.YS. 394 (2d Dep't 1921). *See also*, 48 N.Y. Jur. *Public Utilities* § 561; 1 N.Y. Jur. *Administrative Law* § 165.

For example, in *Town of North Hempstead* v. *Public Serv. Corp., supra,* plaintiff sought injunctive relief to restrain defendant gas company from making a service charge authorized by the Public Service Commission. The Court held:

> "The decision of the Public Service Commission is subject to review by certiorari [now Article 78] in which the record of the evidence taken before the commission can be brought before the court. *Its decision cannot be attacked collaterally,* as is done in this case, unless its order was without the scope of its jurisdiction.
>
> "We cannot say as a matter of law that a service charge is equivalent to an exaction of meter rental either in a direct or an indirect manner. The Public Service Commission has decided as a question of fact that it is not, and we think its decision is not subject to collateral review." 191 N.YS. at 395 (Emphasis added.)

In seeking to enjoin the Telephone Company from applying the tariff provision requiring deposits in certain cases, plaintiff challenged a tariff previously reviewed and approved by the Commission. The record before the Commission is not before this Court. Under the well-established principle set forth above, the complaint was properly dismissed as an improper collateral attack upon the Commission's order.

POINT V

Under the Johnson Act, the District Court had no jurisdiction to invalidate state telephone deposit tariffs.

By its complaint plaintiff sought an order enjoining the Telephone Company from requiring "discriminatory" deposits (Complaint, Par. 53). Plaintiff thus sought to challenge an order affecting public utility rates made by a state administrative agency. The Johnson Act, 28 U.S.C. § 1342, was enacted by Congress to restrict federal jurisdiction in such cases. It provides:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State."

The complaint was properly dismissed for lack of federal jurisdiction, as other constitutional challenges to orders affecting rates have been dismissed pursuant to the Johnson Act. *See, e.g., David* v. *N. Y. Tel. Co.*, 341 Fed. Supp. 345 (S.D.N.Y. 1970), *aff'd* 470 Fed. 2d 192 (2d Cir. 1973); *Preston County Light & Power Co.* v. *Public Serv. Comm'n*, 297 F. Supp. 759 (S.D. W. Va. 1969); *Poindexter*

v. *Board of Supervisors,* 177 F. Supp. 852 (W.D. Va. 1959); *General Tel Co. of the Southwest* v. *Robinson,* 132 F. Supp. 39 (E.D. Ark. 1955).

The tariff provision challenged by plaintiff was filed with the Public Service Commission pursuant to the requirements of the Public Service Law. The Commission is empowered to order the Telephone Company to file tariffs governing every aspect of the Company's rates and revenues. Such tariffs are subject to the approval of the Commission and are deemed to be binding if not disapproved. N.Y. Pub. Serv. Law §§ 92, 97. The current deposit tariffs were required to comply with the regulations promulgated by the Public Service Commission in accordance with the Public Service Law. 16 NYCRR 600 *et seq.* By resolution, the Commission specifically ordered the Telephone Company and all other utilities to file tariffs to conform with its regulations on deposits. Pub. Serv. Comm'n Case No. 25695, p. 6 (1970).

Such orders of the New York State Public Service Commission regarding deposits are orders "affecting rates" under the Johnson Act. The official compilation of Commission regulations, *supra,* recites that the statutory basis for the deposit regulations is Section 97 of the Public Service Law, which grants the Commission the authority to issue appropriate orders concerning all aspects of the Telephone Company's rate structure. The fact that regulatory orders regarding deposits are orders affecting rates was made clear by the California Supreme Court in *Wood* v. *Public Util. Comm'n, supra,* 4 Cal. 3d 288, 481 P. 2d 823, *appeal dismissed,* 404 U.S. 931 (1971), which stated that deposit and credit rules,

> "are in effect nothing more than a part of the utilities' rate structures. The commission must fix rates that will provide a reasonable return on the utility's investment, and in doing so it has wide discretion to

make rate classifications that reflect a broad and varied range of economic considerations." *Id.*, 481 P. 2d at 827.

See also, Southwestern Tel. & Tel. Co. v. *Danaher, supra,* 238 U.S. at 489, 490.

The Johnson Act is clearly applicable to the instant case because the four additional statutory requirements of the Act have been met: (1) federal jurisdiction is based on "repugnance" to the Constitution; (2) the challenged order does not "interfere" with interstate commerce; (3) the challeged order has been made after "reasonable notice and hearing;" and (4) New York State provides plaintiff with a "plain, speedy and efficient remedy."

1. *Alleged Repugnance to Constitution.* The plaintiff asserted that federal jurisdiction was based upon the alleged unconstitutionality of the deposit requirements, so clearly jurisdiction is based on repugnance to the Constitution.

2. *No Interference with Interstate Commerce.* The deposit tariff and regulations do not interfere with interstate commerce. It is well established that orders affecting local telephone rates do not "interfere" with interstate commerce. *Preston County Light & Power Co.* v. *Public Serv. Comm'n, supra; General Tel. Co. of the Southwest* v. *Robinson, supra. See also, Kansas-Nebraska Natural Gas Co.* v. *St. Edward,* 134 F. Supp. 809 (D. Neb. 1955), *appeal dismissed,* 229 F. 2d 744 (8th Cir. 1956); *New York Cent. R.R. Co.* v. *Illinois Commerce Comm'n,* 77 F. Supp. 520 (N. D. Ill. 1948).

3. *Reasonable Notice and Hearing.* Under the Johnson Act, an order of a regulatory commission has been promulgated with "reasonable notice and hearing" if a "full opportunity to present . . . evidence and arguments

is given." *Preston County Light & Power Co.* v. *Public Serv. Comm'n, supra,* 297 F. Supp. at 764; *Mississippi Power & Light Co.* v. *City of Jackson,* 9 F. Supp. 564 (S.D. Miss. 1935). This requirement was also satisfied here. The New York State Public Service Commission is required by statute to give reasonable notice before promulgating orders affecting rates. N.Y. Pub. Serv. Law §§ 92, 97.

Any interested party has a full opportunity to present recommendations to the Commission. Moreover, Section 97 of the Public Service Law grants subscribers the right to seek a hearing before the Commission at any time to consider the reasonableness of the deposit tariff and the manner of its application.

4. *Existence of State Remedies.* Orders of the Public Service Commission can be judicially reviewed in an Article 78 proceeding, CPLR 7801 *et seq.*, in the New York State courts. *Childs* v. *Brooklyn Edison Co.,* 105 N.Y.S. 2d 503, 513 (Sup. Ct. Kings Co. 1951). The Article 78 proceeding clearly meets the final requirement of the Johnson Act by providing a "plain, speedy and efficient remedy" in the New York State courts. Under CPLR 7804, an Article 78 proceeding is brought as a special proceeding, a simplified procedural device designed to bring about a speedy resolution of the issues presented. *See generally,* 8 Weinstein, Korn & Miller, *New York Civil Practice,* ¶ 7801.04 (1971). The court is empowered to annul, confirm or modify an administrative determination, and it can direct or prohibit specified action by an administrative agency. CPLR 7806. In *Preston County Light & Power Co.* v. *Public Serv. Comm'n, supra,* and *General Tel. Co. of the Southwest* v. *Robinson, supra;* the courts held that similar state remedies satisfied the requirements of the Johnson Act.

Accordingly, the requirements of the Johnson Act were here satisfied and that Act precludes federal jurisdiction of plaintiff's claims.

POINT VI

Federal jurisdiction of the action is not provided either by the Federal Communications Act or by federal common law.

Plaintiff evidently alleges federal jurisdiction under the Federal Communications Act, 47 USC § 151-609. Diversity jurisdiction is not present. Plaintiff's theory of federal jurisdiction appears to ignore clear and express provisions of the Federal Communications Act and federal jurisdiction of this action is not conferred by any of the provisions apparently relied on by plaintiff.

Plaintiff requests injunctive relief enjoining defendant from terminating plaintiff's telephone service. Section 406 of the Communications Act, quoted at length by plaintiff in its brief, gives the district courts jurisdiction to compel carriers to furnish facilities to any person who has been prevented (due to violation of the Act), from receiving interstate service at the same charges, or upon terms and conditions as favorable, as those given by the carrier to others. Plaintiff does not specify the particular violation of the Act it has in mind. In addition, as noted by the District Court, there is no issue present in this case concerning the rates the Company charges for interstate calls and therefore, no federal question arises under this section. See also, *Palermo* v. *Bell Telephone Co. of Penn.*, 415 F 2d 298 (3rd Cir. 1969).

Plaintiff also seeks substantial money damages. Section 206 of the Communications Act provides for liability for damages on the part of a common carrier which does anything prohibited by the Act or fails to do something required to be done. Section 207 provides that actions or proceedings seeking recovery for such damages may be maintained either before the Federal Communications Commission or in the District Courts. That this action is not within the jurisdiction provided by Sections 206 and

207 was established in this Circuit by *Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.*, 391 F.2d 486 (2nd Cir. 1968).

In *Ivy*, plaintiff sued American Telephone and Telegraph Company and New York Telephone Company in a federal District Court, for recovery of damages resulting from allegedly improper "private line" transmission of signals for interstate radio broadcasts of certain public events. Plaintiff alleged gross negligence and breach of contract in the furnishing of service and invoked federal jurisdiction under the statutes relied on by plaintiff here. This Court denied recovery under the Federal Communications Act, holding that the remedy and jurisdiction conferred by Sections 206 and 207 of the Federal Communications Act were limited to cases involving specific violations of the Act and that claims of negligence and breach of contract did not involve violations of the Act. The Second Circuit categorically stated:

> ". . . the Act does not expressly grant a remedy for negligence or breach of contract in the rendition of communications service. Nor do we think that such a remedy should be 'inferred' from the Act . . . Therefore, 47 U.S.C. § 207 does not confer jurisdiction on the district court." 391 F.2d at 489.

As in *Ivy*, plaintiff here also alleges *inter alia*, a breach of contract in violation of the Act. However, the *Ivy* case involved the installation of special private line facilities for the specific purpose of transmitting interstate radio broadcasts. That type of service is clearly regulated by the Communications Act, which provides (Section 202(b)) that all services even incidentally relating to radio communications are subject to the Act.

The present case, however, deals not with broadcasting, but with charges and regulations of local telephone exchange service, regulated by the New York State Public

Service Commission. These are matters which Section 152(b) and 221(b) expressly exclude from the Federal Communications Act, even where interstate commerce is involved. Section 221(b) states:

> "Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with . . . telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority."

The matters here complained of do involve service and facilities "in connection with telephone exchange service", and they are "subject to regulation by a State commission". They are therefore expressly excluded from the Act, and no jurisdiction arises thereunder.

While it was held in *Ivy* that the plaintiff had a claim under federal common law with respect to interstate radio broadcasting, that ruling has no application here. As shown, *Ivy* related to specific private line facilities furnished for the purpose of radio broadcasting (391 F.2d at 488), made subject to federal regulation by Section 202(b) of the Act. This case, however, involves normal telephone exchange service, which is expressly excluded from federal regulation in Sections 152(b) and 221(b) of the Act. As to these exempted matters it cannot be said here, as it was in *Ivy,* that "the federal statutory scheme . . . indicates a congressional policy requiring that the duties and liabilities . . . be determined according to federal rules in order to assure uniformity of rates and service." 391 F.2d at 490. On the contrary, Congress has expressly mandated that such matters are for the states.

Federal jurisdiction of this action is thus not provided either by the Federal Communications Act or by federal common law. Consequently there is no federal jurisdiction of this action under either 28 U.S.C. § 1331 or 28 U.S.C. § 1337, because the matters raised here, not arising under either federal statute or federal common law, do not involve a federal question or arise under an act of Congress regulating commerce.

If this case were held to present a federal claim, there would be no aspect of telephone exchange service that could not be transformed into a federal claim by the simple expedient of pleading some tangential effect on interstate communication. The federal courts would thus be subjected to all claims of inadequate local telephone service or facilities, as in this case, a result not only undesirable for the federal courts, already overburdened, but in violation of the expressed will of Congress.

POINT VII

This Court should abstain from exercising jurisdiction in order to avoid unnecessary conflict with the administration by New York State of its own affairs.

Even assuming that the Johnson Act does not deprive the federal courts of jurisdiction that might otherwise exist, this Court should nevertheless abstain from the exercise of such jurisdiction for reasons of comity. *Zucker* v. *The Bell Telephone Company of Pennsylvania*, 373 Fed. Supp. 752 (E. D. Pa. 1974); *Alabama Public Service Commission* v. *Eastern Ry. Co.*, 341 U.S. 341 (1951); *Buford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Commission of Texas* v. *The Pullman Co.*, 312 U.S. 496 (1941); *Allegheny Airlines, Inc.* v. *Penna. Pub. Util. Commission*, 465 Fed. 2d 237 (3d Cir. 1972); *General Investment and Service Corp.* v. *Wichita Water Co.*, 236 Fed. 2d 464 (10th Cir. 1956); *Davis* v. *City of Little Rock*, 136 Fed. Supp. 725 (E. D. Ark. 1955).

As noted by the court in *Zucker* v. *The Bell Tel. Co. of Penna., supra,* at p. 756:

> "It is well established that a federal court should abstain from exercising its jurisdiction in order to avoid unnecessary conflict with the administration by a state of its own affairs."

Accordingly, in *Buford* v. *Sun Oil Co., supra,* a case involving an attack on the validity of proration orders in Texas oil fields, on the ground, among others, that the orders denied to Sun Oil due process of law, the Court held that the federal district court should have dismissed the complaint. The court found that the exercise of the district court's jurisdiction would have interfered with a unified and comprehensive state scheme for regulating a complex industry and that the issues involved a specialized aspect of a complicated regulatory system of local law, which should be left to the local administrative bodies and courts.

Again, in *Alabama Public Service Commission* v. *Southern Ry. Co., supra,* the Supreme Court determined that the Johnson Act was inapplicable since the order challenged was not a rate order; nevertheless, the court decided that the district court should have declined to exercise its jurisdiction as a matter of sound equitable discretion. It was recognized that, in view of the strong underlying principle of avoiding "needless friction with state policies", the plaintiffs' rights should be "pursued through the state courts".

The doctrine enunciated in *Buford* and *Alabama Public Service Commission* has been followed by lower federal courts where the courts found the Johnson Act inapplicable. For example, in City of Monroe, *Louisiana* v. *United Gas Corporation,* 253 F. 2d 377 (5th Cir. 1958), the court found the Johnson Act applicable, and accordingly dismissed plaintiff's action which sought to enjoin

rates fixed by a state agency. In the course of its opinion the court stated:

> "Of appellant's alternative primary contention, little need be said than that if, as the court did in the *General Investment & Service Company* case, 236 F. 2d at page 468, we should concede without deciding that Sec. 1342 did not deprive the court of jurisdiction, we must still conclude under the cases cited, *supra,* in support of that contention, that the court should have denied plaintiff the right to proceed in the federal court. [citing Alabama Public Service Commission]." sion]."

In *Davis* v. *City of Little Rock, supra,* the court dismissed the action under the doctrine of comity after finding that the Johnson Act did not apply. The court stated:

> "Although it does not appear that the ordinance here challenged was enacted after reasonable notice and hearing, it is obvious that the other three prohibitory conditions of the Act are present, and under such circumstances we think that the doctrine under discussion is particularly applicable, in the light of the clear Congressional policy expressed in the statute."

See also, *General Telephone Company of Southwest* v. *Robinson,* 132 F. Supp., at page 46, where the Court stated that "since in the instant case at least three of the four conditions of the Act have been met, we feel that the situation presented is one to which the rule of comity is peculiarly applicable."

Finally, in *Allegheny Airlines Co.* v. *Pennsylvania Pub. Util. Comm'n, supra,* the court finding that the action posed a serious threat "to the orderly procedures and rules" of a state regulatory body, affirmed an order of this district court dismissing under the doctrine announced in *Buford* and *Alabama Public Service Comm'n, supra,* a challenge to an order of the Public Utility Commission.

Based on the foregoing, it is clear that even assuming that the provisions of the Johnson Act are not applicable to the case herein, this Court should nonetheless abstain from jurisdiction by reason of the principles of comity.

CONCLUSION

For the foregoing reasons, the order below should be affirmed in its entirety.

New York, New York, July 1, 1975.

Respectfully submitted,

GEORGE E. ASHLEY
Attorney for Defendant-Appellee
New York Telephone Company
1095 Avenue of the Americas
New York, New York 10036

WALTER C. REID
Of Counsel

Service of three (3) copies of
the within Brief is
hereby admitted this 11th day
of July, 1975

Joseph R. McGuffey
Attorney for
Hotaft Management Corp